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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 605

BEACON MILLING COMPANY, INC., *Petitioner*,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

BEACON MILLING COMPANY, INC.

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October 14, 1944.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI.

Beacon Milling Company, Inc., respectfully presents this petition and prays that this Honorable Court grant a writ of certiorari and review the decision of this case by the Court of Appeals of the State of New York, which said decision was delivered on July 19, 1944, and reversed judgments of the Appellate Division in the Fourth Judicial Department and of the Supreme Court, Monroe County, in favor of petitioner; and in support of its petition Beacon Milling Company, Inc., represents:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

The New York Central Railroad Company (hereinafter called New York Central) filed its complaint in the Supreme Court of the State of New York for Monroe County, against Beacon Milling Company, Inc., (hereinafter called Beacon) demanding judgment in the sum of Ten thousand six hundred three dollars and 65 cents ($10,603.65) plus interest thereon as charges, more specifically described as "emergency charges," claimed to be due by Beacon to it for the transportation of certain property in interstate commerce in the period April 18, 1935-December 31, 1936. (ff. 4-25)* About 4650 charges on upwards of 2000 interstate shipments were involved. (f. 9) The details of these various transactions are not included in the record because of the stipulation of the parties (ff. 16-24) that three individual shipments, described in the Stipulation (ff. 18-20) and supported by the documents evidencing the transportation (ff. 115-124) "are representative and typical to such an extent that determination of the legal rates applicable to the same will be a determination of the issue with respect to all the several shipments * * *." (f. 18)

On August 29, 1941, John Van Voorhis, Justice of the Supreme Court rendered his decision (ff. 25-33) holding that the charges claimed were not lawfully due. September 24, 1941, the Court entered its order (ff. 34-35) of judgment in favor of Beacon, and dismissing the New York Central's complaint.

The said judgment and order were by the New York Central appealed to the Appellate Division of the Supreme Court, Fourth Department, which entered its Judgment

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* Contemporaneously, Lehigh Valley Railroad Company filed in the same court its similar complaint against Beacon, the amount of the charges claimed to be due it for interstate transportation of Beacon's property being $8,156.97. By agreement of the parties this Lehigh Valley complaint is held in abeyance pending ultimate disposition of the New York Central complaint, and will then be disposed of accordingly.

of Affirmance on April 2, 1943. (ff. 73-75) No opinion was rendered by the Appellate Division. (f. 81) Leave to Appeal to the Court of Appeals was granted to the New York Central by the Appellate Division in its order dated June 6, 1943. (ff. 76-77)

The emergency charges which are the subject of the complaint are contended by the New York Central to have been authorized by the Interstate Commerce Commission in two reports cited *Emergency Freight Charges, 1935*, 208 I. C. C. 4, decided March 26, 1935, *s. c.*, 215 I. C. C. 439, decided June 9, 1936, and the accompanying orders. (ff. 37, 70-72, also 46-48) Beacon contended that by virtue of an earlier report of the Commission cited *Beacon Milling Co.* v. *New York Central R. Co.*, 157 I. C. C. 635, decided October 10, 1929, sometimes herein cited as the *Beacon case*, and the outstanding and effective order entered in connection therewith (ff. 38-45) the said emergency charges could not lawfully be assessed against Beacon's traffic.

On July 19, 1944, the Court of Appeals handed down its opinion, *New York Central Railroad Company* v. *Beacon Milling Company, Inc.*, 293 N. Y. 218, reversing the judgments of the courts below, but with two qualifications:

> (1) Because the New York Central had taken no appeal from the denial by the trial court of its motion for summary judgment, the Court of Appeals held it was without power now to direct summary judgment in favor of the New York Central.
>
> (2) Reversal of the judgments below was without prejudice to any proceedings which Beacon may hereafter institute before the Interstate Commerce Commission.

Despite these qualifications, the opinion of the Court of Appeals is believed to be a final opinion within the rule laid down by this Court in *Department of Banking* v. *Pink*, 317 U. S. 264, decided December 21, 1942. As respects the first qualification, the Court of Appeals has nevertheless decided all the issues; its decision definitely and finally de-

termines the merits of the law suit. Furthermore, the decision adjudicates the right of the New York Central to collect the emergency charges in the computed amount set out in the stipulation of agreed facts. (R. 23-24) Therefore, the New York Central may now petition the Supreme Court of Monroe County to enter an order denying its motion for summary judgment and then appeal to the Appellate Division. The Appellate Division would reverse on the basis of this decision of the Court of Appeals and order judgment in the amount stipulated to be due, unless said decision of the Court of Appeals is reversed by this Honorable Court. See Civil Practice Act of New York State, section 612; *Naftal* v. *Jarvis*, 203 N. Y. A. D. 75; *Tossiny* v. *The City of New York*, 211 N. Y. A. D. 816. Petitioner is informed and believes that the New York Central will in due time proceed in the Supreme Court of Monroe County to cure the defect in its position.

As respects the second qualification, Beacon is under no necessity to proceed before the Interstate Commerce Commission, as the issue to be determined is one of law and not of commission administration.

B. REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

1. The issue arises solely in connection with the transportation of property by common carriers in interstate commerce.

2. Determination of the issue requires the ascertainment of the lawful rates and charges applicable to the transportation of property by the New York Central for Beacon.

3. Ascertainment of the lawful rates and charges requires only the construction of certain reports of the Interstate Commerce Commission and its orders entered in connection therewith, and of the tariffs of rates and charges published by the New York Central in assumed conformity with such orders. No administrative action is required.

4. The Court of Appeals erred in construing the reports and orders of the Interstate Commerce Commission in *Emergency Freight Charges, 1935,* 208 I. C. C. 4, 215 I. C. C. 439, and in concluding that said reports and orders overrode the earlier report and order of the Commission in *Beacon Milling Co.* v. *New York Central R. Co.,* 157 I. C. C. 635.

5. The Court of Appeals erred in holding that the emergency transit rates published by the New York Central as Items 70 and 75 of the emergency tariffs overrode the said earlier report and order of the Commission in *Beacon Milling Co.* v. *New York Central R. Co., supra,* so far as necessary to permit the emergency rates and charges to be applied to the transportation and service here in question.

6. The Court of Appeals erred in holding that the so-called legal rate and charge published by the New York Central in its tariffs took precedence over the lawful rate and charge prescribed by the Interstate Commerce Commission.

7. The Court of Appeals erred in holding that accordingly Beacon must find its remedy in proceedings before the Interstate Commerce Commission for administrative relief.

8. The Court of Appeals erred in failing to affirm the judgments of the Supreme Court of Monroe County and of the Appellate Division of the Supreme Court in the Fourth Judicial Department.

Wherefore, your Petitioner, Beacon Milling Company, Inc., respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of the State of New York and commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and titled on its docket as No. 191, *The New York Central Railroad Company, Plaintiff-Appellant* v. *Beacon Milling Company, Inc.,*

Defendant-Respondent; and that the said judgment of the said Court of Appeals may be reversed by this Honorable Court; and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Supreme Court of Monroe County (ff. 25-33) is not officially reported.

The Appellate Division, Fourth Judicial Department, handed down no opinion. (ff. 80-81) See Mem., 266 N. Y. A. D. 708.

The opinion of the Court of Appeals of the State of New York is reported as *New York Central Railroad Company,* v. *Beacon Milling Company, Inc.,* 293 N. Y. 218, decided July 19, 1944.

The Jurisdiction of This Court.

Jurisdiction of this Court is found in U. S. C. A., Title 28, Sec. 344 (b), and particularly in those provisions reading:

> "It shall be competent for the Supreme Court by certiorari, to require that there shall be certified to it for review and determination with the same power and authority and with like effect as if brought by writ of error, (or appeal) any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution or any * * * statute of, or * * * authority exercised under, the United States; and the power to review may be exercised as well where the Federal claim is sustained as well as where it is denied. * * *"

Statement.

Beacon Milling Company, Inc. (hereinafter called Beacon) is a New York corporation which is engaged in the manufacture of animal and poultry feeds, sometimes called mixed feeds, at Cayuga, N. Y. Its manufacturing plant at that point has direct side-track connection with The New York Central Railroad Company (hereinafter called New York Central) and through the latter is indirectly connected with Lehigh Valley Railroad Company.

In the manufacture of animal and poultry feeds Beacon uses large quantities of many raw materials, principally, however, grain, grain products, and grain by-products. These are generally purchased in the south and west and are transported to Cayuga by railroad, deliveries being made by the two railroads serving the plant. The markets for the manufactured feeds are mainly east and south of Cayuga, and shipments from that point are made by the same two railroads.

In its relation to the railroads and their transportation service Beacon's Cayuga plant operates on what is commonly referred to as a "transit" arrangement. Under this, the raw materials are received at Cayuga, are there manufactured, fictionally, "in transit," and the feed is then shipped from Cayuga, all as a through transportation service from original point of shipment of the raw material, via Cayuga, to final destination of the manufactured product. In these circumstances there arises the important question of what rates are applicable to that through service to determine the amount of the charge for transportation.

For many years after Beacon began operating at Cayuga, the rail carriers assessed charges for their transportation service on the basis of the rate from original point of shipment of the raw material to final destination of the mixed feed applicable on the outbound feed. To instance, if an outbound shipment of feed from Cayuga to Wilmington, Del., were supported in the transit account by an inbound shipment of corn from Chicago to Cayuga, then the charge for the through transportation, Chicago to Wilmington was computed on the basis of the rate applicable on mixed feed from Chicago to Wilmington.

The lawfulness of this practice of the carriers was raised by Beacon before the Interstate Commerce Commission. That body, on October 10, 1929, in *Beacon Milling Co.* v. *New York Central R. Co.*, 157 I. C. C. 635,—*the Beacon case*, —found that the carriers' "transit rules, regulations and practices in their application to grain, grain products, and grain by-products * * * were, are, and for the future will be unjust and unreasonable, and that the application of these unlawful rules and practices has resulted and will result in the collection or assessment of charges for the through transportation from points of origin to final destination that were, are, and for the future will be unreasonable * * *." (page 640)

Contemporaneously, the Commission entered its usual cease and desist order, and further required the carriers, effective on or before December 30, 1929, to

> " establish * * * and thereafter to maintain and apply transit rules, regulations and practices with respect to the transportation of grain, grain products and grain by-products from points in central, southern and western territories to Cayuga, N. Y., there manufactured into mixed feed and shipped to destinations in eastern territory and New England,"

in compliance with the findings in the Commission's report, page 640 (ff. 38-45).

This order of October 10, 1929, further provided that it should "continue in force until the further order of the Commission." (f. 45) It remained in full force and effect throughout the period of this controversy, April 18, 1935-December 31, 1936. The gist of the order was that from and after December 30, 1929, charges for transportation service from original point of shipment of the raw material to final destination of the mixed feed should be computed on the basis of the through rate applicable on the inbound raw material. Specifically, as respects the shipment instanced above, the lawful charges thereafter would be computed on the basis of the rate on corn from Chicago to Wilmington.

The carriers respondent to the Commission's order of October 10, 1929, entered pursuant to its report in *Beacon Milling Co.* v. *New York Central R. Co., supra*, obeyed it. Ever since that time the *normal* charges of the carriers for such transportation of property for Beacon, as distinguished from the so-called *emergency* charges, have been assessed in strict accordance with that order. The trial court so found, and stated (f. 31):

> "It is conceded that the normal freight rates have been computed and paid on the basis of the incoming commodity."

While the order of the Commission in the *Beacon case* (ff. 38-45) was still outstanding and in full force and effect, the Class I railroads of the entire United States filed with the Commission on August 27, 1934, a petition which sought authority to make increases of a general nature in their freight rates and charges. The basis of the petition was revenue necessity, an incident of the then current business depression. There being at that time many outstanding orders of the Commission which required the maintenance of rates and charges at prescribed levels,—and among them the order in the *Beacon case*,—the carriers also asked that the Commission modify such outstanding orders so far as necessary to permit the increases which they were seeking to become effective. The Commission docketed this application of the carriers and the investigation which it then made into the subject on its own motion, as *Ex Parte 115*.

There followed the usual procedure of hearing, etc., and ultimately the Commission denied the relief sought by the Class I carriers but granted authority to make certain emergency increases, saying,—*Emergency Freight Charges, 1935*, 208 I. C. C. 4, 59:—

> "The emergency charges authorized are set forth in detail in Appendix A."

That Appendix A is incorporated in the record now before this court at ff. 49-69.

The order then entered by the Commission to give force and effect to its findings in *Emergency Freight Charges, 1935, supra*, is included in this record at ff. 70-72. To resolve the conflict between that order and outstanding rate orders previously entered by the Commission and in full force and effect, the Commission, in its order entered in connection with *Emergency Freight Charges, 1935, supra*, provided as follows (ff. 71-72):

> "*It is ordered*, That all outstanding unexpired orders of the Commission, whether or not effective upon the date of this order, authorizing or prescribing rates and

> charges which have or have not been published at the date of this order, and all outstanding suspension orders, be, and they are hereby, modified to the extent necessary to permit the emergency charges herein authorized to be applied to the rates and charges authorized or prescribed in or maintained or held by virtue of said outstanding orders; *but that in all other respects said orders shall remain in full force and effect unaffected by this order.*" (Italics ours.)

Attention is now directed to the commodities on which the Commission authorized emergency charges and also to the commodities respecting which the Commission declined to authorize emergency charges. Thus, Part 4 of Appendix A (ff. 58-64) in Group 701 (ff. 63-64) authorized an emergency charge of 3 cents per hundred pounds on "Feed, animal or poultry, rated under that heading in consolidated classification." * But the same Appendix A in Part 3 (ff. 56-57) lists the "Commodities, in carloads, on which no line-haul emergency charges are authorized," and among such commodities is substantially the entire grain list (f. 56, Group Numbers 10, 20, 30, 40, 41, 42, 50, 51, 52, 61, 70).

It is this emergency charge on animal or poultry feed which gives rise to the controversy here before the court. The claim of the carriers is that they were authorized to assess an emergency charge on animal or poultry feed by the Commission's report and order in *Emergency Freight Charges, 1935, supra,* and *s. c.*, 215 I. C. C. 439. Beacon admits such emergency charges were authorized but contends that they were inapplicable on its transit shipments. The Commission's order in the *Beacon case* prescribed no specific rates; it prescribed only a rule for the assessment of charges. That rule provided that the charges for the transportation of Beacon's property,—the raw materials into

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* In the subsequent decision in *Emergency Freight Charges, 1935,* 215 I. C. C. 439, 445, the Commission notes that "the maximum charge of 3 cents per 100 pounds on animal or poultry feeds not made wholly of grain was reduced to 1 cent", by voluntary action of the carriers subsequent to the Commission's first decision.

Cayuga, and the animal or poultry feeds from Cayuga,—should be assessed on the basis of the rates applicable on the inbound raw materials. As no emergency charges were authorized by the Commission to be applied on the inbound shipments of grain, grain products, and grain by-products, it follows that no emergency charges were properly assessable under *Emergency Freight Charges, 1935*, on the transportation of Beacon's property. This is particularly so because of the provision of the Commission's order entered in connection with its report in *Emergency Freight Charges, 1935, supra* (ff. 70-72), which is quoted above, and maintained all outstanding orders of the Commisison in full force and effect except to the extent necessary to permit the emergency charges therein authorized to be applied.

Summary of Argument.

The Interstate Commerce Commission in 1929, condemned as unlawful transit rules, regulations and practices then maintained by common carrier railroads with respect to the transportation of Beacon's property in interstate commerce. The Commission prescribed just and reasonable transit rules, regulations and practices to govern in the future. Its orders to that effect were obeyed by the carriers.

In 1935 and 1936, as a means of revenue relief for the carriers, the Commission authorized them to make certain increases of an emergency nature in their rates, on some, but not all commodities. Outstanding and effective orders of the Commission were modified to the extent necessary to permit such emergency increases to be made, but not otherwise. In assumed conformity with the orders of the Commission authorizing emergency increases the carriers, incorporated in their tariffs substantially the identical rule with respect to Beacon's property which had been condemned by the Commission in 1929 as unlawful and relief against which continued in effect by virtue of the orders then issued.

Determination that the carriers, in publishing their emergency increases, violated the orders of the Commission is merely a matter of construction of those orders and of the tariffs issued by the carriers to make the emergency increases effective. Such construction is a question of law to be determined by the courts, no administrative action by the Commission being necessary.

The Court of Appeals of the State of New York misconstrued the orders of the Commission and its action in that respect can be and should be reversed by this Court. The Court of Appeals erred in holding that Beacon's relief was by administrative procedure before the Interstate Commerce Commission. The Court of Appeals has thus denied to Beacon its right, guaranteed by the Interstate Commerce Act, to transportation in interstate commerce at no higher than just and reasonable rates. Such rates have heretofore been fixed and ordered by the Commission.

The principal opinions which are considered by Petitioner as applicable and persuasive with reference to the points argued are:

Great Northern R. Co. v. *Merchants Elevator Co.*, 259 U. S. 285.
Turner, D. & L. Lumber Co. v. *Chicago, M. & St. P. R. Co.*, 271 U. S. 259.
Central New England R. Co. v. *Boston & Albany R. Co.*, 279 U. S. 415.
Arizona Grocery Co. v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370.
United States Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474.
Brown & Sons Lumber Co. v. *Louisville & N. R. Co.*, 299 U. S. 393.
Crancer v. *Lowden*, 315 U. S. 631.

For these reasons a Writ of Certiorari should be granted and this court should review and finally reverse the decision of the Court of Appeals of the State of New York.

ARGUMENT.

I. UNDER THE ORDER OF THE COMMISSION IN THE *BEACON CASE* IT WAS UNLAWFUL FOR THE NEW YORK CENTRAL TO CHARGE, FOR THE CARRIERS' TRANSPORTATION OF BEACON'S PROPERTY IN INTERSTATE COMMERCE, ANY RATES AND CHARGES OTHER THAN THOSE APPLICABLE ON THE RAW MATERIALS RECEIVED AT CAYUGA.

II. THE ORDER OF THE INTERSTATE COMMERCE COMMISSION ENTERED IN CONNECTION WITH ITS REPORT IN THE *BEACON CASE* WAS NOT MODIFIED BY THE ORDERS SUBSEQUENTLY ISSUED IN CONNECTION WITH THE COMMISSION'S REPORTS IN *EMERGENCY FREIGHT CHARGES, 1935*, AND REMAINED IN FULL FORCE AND EFFECT THROUGHOUT THE PERIOD OF THIS CONTROVERSY.

A conclusion with respect to these two propositions involves the court in nothing more than a construction of the Commission's reports and orders in the *Beacon case* and in *Emergency Freight Charges, 1935*. That construction is obviously a proper function for the court, but the construction of the court below is, of course, subject to the power of revision of this court. *Great Northern R. Co.* v. *Merchants Elevator Co., supra*, page 291; *Central New England R. Co.* v. *Boston & Albany R. Co., supra*, page 420.

Before the *Beacon case*, and ever since, the carriers have always maintained in effect rates for the transportation of both the inbound raw materials used by Beacon at Cayuga, and the outbound mixed feed. Prior to the *Beacon case*, they assessed their freight charges for the transportation of Beacon's property on the basis of the rate applicable on the mixed feed from original point of shipment of the raw material to final destination of the mixed feed. This was the subject of Beacon's complaint in that proceeding. The Commission's report and order therein condemned

the carriers' practice and prescribed that for the future the charges for the transportation of Beacon's property should be based upon the rate applicable upon the inbound raw material.

The point to be kept in mind is that no specific rates, in the strict sense of the word, were prescribed by the Commission for future application. There was indeed no attack upon any specific rates in the *Beacon case*. All that was in issue was the basis upon which the charges were assessed and it was only with respect to that issue that the Commission prescribed its rule for the future. As put by the Commission in its order, the carriers were required "to maintain and apply transit *rules, regulations and practices*" (italics ours) with respect to Beacon's property. The specific requirement was that the charges be assessed on the basis of the rates applicable to the transportation of the inbound raw material.

When the carriers subsequently came before the Commission for revenue relief in *Emergency Freight Charges, 1935*, they were seeking increases in rates. The Commission granted an increase on mixed feed; it specifically declined to grant any increase on the inbound raw materials received at Cayuga. There is nothing in the report or in the orders in *Emergency Freight Charges, 1935* which, either specifically or otherwise, modifies on abandons the rule for assessing charges which the Commission laid down in the *Beacon case*.

It follows, therefore, that that rule of the *Beacon case*, laid down to prescribe the basis upon which Beacon should be assessed for the transportation of its property in interstate commerce, thereafter remained in full force and effect and unaffected by the Commission's orders in *Emergency Freight Charges, 1935*.

The gist of that rule was that the charges should be assessed on the basis of the rates applicable on the inbound raw material received at Cayuga. As no emergency increases were authorized to be applied on those raw materials, none could lawfully be applied to the transportation of Beacon's property.

III. THE TARIFF OF RATES AND CHARGES PUBLISHED BY THE NEW YORK CENTRAL IN ASSUMED CONFORMITY TO THE COMMISSION'S ORDERS IN *EMERGENCY FREIGHT CHARGES, 1935*, ACTUALLY WENT BEYOND THE AUTHORITY GRANTED BY THE COMMISSION IN SAID ORDERS TO MAKE EMERGENCY INCREASES IN FREIGHT RATES, AND WAS PUBLISHED IN VIOLATION OF THE COMMISSION'S ORDER IN THE *BEACON CASE*, THEN IN FULL FORCE AND EFFECT.

The orders of the Commission having been construed, and the extent of the carriers' authority to publish emergency increases having been thus determined, there arises the question whether the carriers' tariffs conformed to the orders.

This involves the court in nothing more than the construction of a written document, i.e., the tariff, couched in language which is non-technical, unambiguous, and clear. "The construction of these railroad tariffs presents, therefore, a question of law, not differing in character from those presented when the construction of any other document is in dispute,"—see *Brown & Sons Lumber Co.* v. *Louisville & N. R. Co., supra*, page 397, citing *Great Northern R. Co.* v. *Merchants Elevator Co., supra*, page 291.

It is not denied that the New York Central in incorporating in its tariffs the rate increases assumed to have been authorized by the Commission in *Emergency Freight Charges, 1935*, did so publish its rates and charges as to make the emergency increases so authorized with respect to mixed feed applicable to the transportation of Beacon's property. Indeed, the manner of publication of the increases was such that the shipper could not escape them, whether the charges assessed against him were based upon the rates on the inbound raw material, or upon the rates on the outbound mixed feed. This results from the language of the tariff, designated as W. S. Curlett, Agent, I. C. C. No.

A-460 (R. Appendix page 83 *et seq.*) which provided in substance, in its Item No. 70 (R. Appendix 86),—

> *first*, that if the inbound commodity was one on which no emergency charge was authorized, then an emergency charge should be assessed on the basis of that applicable to the outbound manufactured product; and, *second*, that in the event there is an emergency charge authorized on the inbound raw material, then the emergency charge to be assessed shall be that applicable on the outbound manufactured product.

This, in the language of the day, caught the shipper "going and coming." But, as we have already shown under Propositions I and II, such publication was not authorized in any way by the Commission's reports and orders in *Emergency Freight Charges, 1935.*

The consequence is that the rule for the assessment of charges prescribed by the Commission in the *Beacon case* continued to govern the relation of these parties as shipper and carrier. Under that rule, the charges to be assessed for the transportation of Beacon's property were to be based on the inbound raw material. No emergency increases were authorized to be applied to them.

IV. THE SO-CALLED LEGAL RATE PUBLISHED BY THE NEW YORK CENTRAL IN ITS TARIFFS IS NOT BINDING IN THE SHIPPER-CARRIER RELATION OF BEACON AND THE NEW YORK CENTRAL BECAUSE IT EXCEEDS THE LAWFUL RATE AND CHARGE PRESCRIBED BY THE COMMISSION.

That there is a distinction between a legal rate and a lawful rate was definitely recognized by this court in *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co., supra,* page 384, decided February 4, 1932. It was there pointed out that "the legal rate",—i.e., the rate contained in the carrier's tariff,—"was not made by the statute a lawful rate,—it was lawful only if it was reasonable."

While the test thus mentioned as determinative of the lawfulness of the tariff rate was the administrative test,—whether reasonable under the standards of the Interstate Commerce Act,—its lawfulness may also be determined by the court in cases where that determination requires no administrative action. *Great Northern R. Co.* v. *Merchants Elevator Co., supra,* pages 291-292; *Turner, D. & L. Lumber Co.* v. *Chicago, M. & St. P. R. Co., supra,* pages 261-262; *United States Navigation Co.* v. *Cunard S. S. Co., supra,* pages 481-482; *Brown & Sons Lumber Co.* v. *Louisville & N. R. Co., supra,* pages 397-398; *Crancer* v. *Lowden, supra,* page 636.

But despite this rule, long established and consistently followed, the New York Central insists that the shipper has no relief here save through original complaint before the Interstate Commerce Commission. Summed up, its contention throughout this proceeding has been that regardless of whether or not its tariff publication exceeded the authority granted by the Commission to make emergency increases in rates and charges, once those tariffs were actually published and in effect, the shipper was bound absolutely to pay the rates and charges specified therein, and could have no relief except by proceeding administratively before the Interstate Commerce Commission.

It is entirely fair to say that this position of the carrier is, on the face of things, preposterous. In substance, it is that the carrier can publish anything it chooses in its tariffs, regardless of the Commission's orders issued for the administrative relief of shippers, can require the shippers to pay the rates as published, and can thus drive the shippers repeatedly to the Interstate Commerce Commission for additional administrative relief.

The law is to the contrary. When the statutes, as they do, give full force and effect to tariff rates and charges, it is only *lawful* tariff rates and charges that are so dignified. This was clearly recognized by the Interstate Commerce Commission in an early case, *Nashville Traffic Bureau* v.

L. & N. R. R. Co., 53 I. C. C. 37, decided April 12, 1919, where the Commission at page 38 said:

> "To the extent that it was duly published and filed in conformity with the requirements of the sixth section of the regulating statute, the rate here assailed was not lacking in legal qualities. Nevertheless, from July 1, 1917, to August 4, 1917, it was published and filed in contravention of the outstanding order entered March 13, 1917, in *Traffic Bureau of Nashville* v. *L. & N. R. R. Co., supra.* To say that such an order may be defeated merely by the publication and filing of a rate higher than that prescribed by the order is to say also that the shipping public is not entitled to the protection of this Commission's orders during the period they are in force. Clearly the statute does not contemplate any such a result."

That very sensible rule has been followed by the Commission with consistency. It is the rule of the Supreme Court of Ohio, laid down with respect to state commerce. *Cleveland, C. C. & St. L. Ry. Co.* v. *Mills Bros.*, 101 O. S. 173; *Pennsylvania R. Co.* v *Public Utilities Commission*, 130 O. S. 469. Note also the *discussion of Wight* v. *United States*, 167 U. S. 512, in this court's decision cited *Mitchell Coal & C. Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 260-261.

V. THE DECISION OF THE COURT OF APPEALS DENIES TO BEACON THE RIGHT TO TRANSPORTATION OF ITS PROPERTY BY COMMON CARRIERS IN INTERSTATE COMMERCE AT NO HIGHER THAN JUST AND REASONABLE RATES AND CHARGES, AS GUARANTEED BY THE INTERSTATE COMMERCE ACT, Section 1 (5) (a).

Section 1, (5) (a) of Part I, Interstate Commerce Act, provides as follows (U. S. C. A., Chap. 1, Sec. 1(5):

> "All charges made for any service rendered or to be rendered in the transportation of passengers or

> property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

This is a guaranty to the shipping public that transportation of its property shall be had at rates which are no more than just and reasonable. By the administrative act of the Interstate Commerce Commission in the *Beacon case* it was determined that the just and reasonable charges for the transportation of Beacon's property shall be those determined by the application of the rates in effect on the inbound raw materials received at Cayuga. That protection for Beacon as a shipper was secured to it by the Commission's order prescribing transit rules, regulations and practices for the future with respect to the transportation of its property in the *Beacon case*. The order so prescribing those rules, regulations and practices was obeyed by the carriers and was in full force and effect throughout the period of the controversy here before the court.

The trial court expressly found (f. 31):

> "It is conceded that the normal freight rates have been computed and paid on the basis of the incoming commodity,"

and added:

> "It is impossible, at the same time, to hold that emergency charges can be levied for the entire haul on the basis of the outgoing commodity."

Yet that is precisely what the carrier insists upon doing,—the anomalous thing of assessing normal charges upon one basis, and emergency charges upon another basis, for an identical transportation service. Moreover, the basis upon which the carrier assumes to assess the emergency charges is one condemned by the Commission in the *Beacon case* as unlawful.

The action of the Court of Appeals of the State of New York, therefore, is nothing less than a denial of Beacon's right to the transportation of its property by common carriers in interstate commerce at not more than just and reasonable rates and charges.

VI. JUST AND REASONABLE RATES AND CHARGES FOR THE TRANSPORTATION OF BEACON'S PROPERTY HAD BEEN DETERMINED BY THE COMMISSION IN THE *BEACON CASE;* BEACON'S RIGHTS WITH RESPECT THERETO HAD BEEN FULLY PROTECTED BY THE COMMISSION BY ITS ORDER PRESCRIBING THE RULE TO GOVERN THE ASSESSMENT OF CHARGES IN THE FUTURE; AND BECAUSE THAT ORDER REMAINED IN FULL FORCE AND EFFECT THROUGHOUT THE PERIOD OF CONTROVERSY THERE IS NO REASON WHY BEACON SHOULD AGAIN SEEK ADMINISTRATIVE RELIEF FROM THE COMMISSION.

The final conclusion of the Court of Appeals is that Beacon may proceed to an assertion of its rights in this controversy before the Interstate Commerce Commission and endeavor there to obtain administrative relief. Such procedure is unnecessary, the point here at issue being one of law, to be determined by the construction of written documents.

The law has been long settled and is well settled in this respect. The leading case is *Great Northern R. Co.* v. *Merchants Elevator Co., supra,* decided May 29, 1922. There, as here, the carrier's contention was that courts are without jurisdiction of cases involving a disputed question of tariff construction unless there had been preliminary resort to the Commission. Denying this, the court said (p. 290);—

> "Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff, it is one of Federal law;

and added that (p. 291),—

> "But what construction shall be given to railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."

Among the more recent cases holding to the same rule there may be cited *Turner, D. & L. Lumber Co.* v. *Chicago, M. & St. P. R. Co., supra; Central New England R. Co.* v. *Boston & Albany R. Co., supra; United States Navigation Co.* v. *Cunard S. S. Co., supra; Brown & Sons Lumber Co.* v. *Louisville & N. R. Co., supra; Crancer* v. *Lowden, supra.*

The *Brown & Sons Lumber Co. case* is of particular interest and significance. Speaking with reference to the carrier's tariffs the court there said (pp. 397-398):

> "The language used is not technical. The meaning of the words is clear. There is no ambiguity. The construction of these railroad tariffs presents, therefore, a question of law, not differing in character from those presented when the construction of any other document is in dispute. Great Northern R. Co. v. Merchants Elevator Co., 259 U. S. 285, 291. As, in each instance, there was available some through route from point of origin to destination for which joint through rates had been published, the rule, by its terms, has no application. *We so hold despite the construction given to the rule by the Commission.*" (Italics ours)

Thus it appears that although the Commission has concurrent jurisdiction of the question of law, sufficient to authorize it to consider and determine the question in the first instance, the final determination is for the court. Exercising its final say, the court reversed the Commission's construction of the tariff in question in the *Brown & Sons Lumber Co. case.*

The only question that could be raised in further proceedings before the Commission respecting this controversy

is the identical question that was raised in the *Beacon case*, and was there determined by the Commission. To be sure, the shipments with respect to which the Commission spoke in the *Beacon case* were not the identical shipments here involved. But the transportation service is identical. As respects that transportation service and the charges lawfully to be assessed by the carriers therefor, the Commission has already spoken concerning the normal charges. Concededly they were assessed in strict accordance with the order in the *Beacon case* throughout the period of this controversy.

We are here, then, on all fours with the determination of this court in *Crancer* v. *Lowden, supra.* There, the Commission, with respect to other shipments, had previously determined the administrative issue. The court relied upon that administrative determination because the question before it with respect to later shipments was "virtually the same question" as the Commission had previously decided. (page 635)

Conclusion.

Beacon Milling Company, Inc., Petitioner, therefore respectfully submits that this case is one calling for the exercise by this Court of its supervisory powers in order that Petitioner's constitutional and statutory rights may be protected, and that accordingly a Writ of Certiorari should be granted and this court should review the decision of the Court of Appeals of the State of New York and finally reverse it.

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(2D)

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 605

BEACON MILLING COMPANY,

Petitioner,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

RESPONDENT'S OPPOSING BRIEF

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PRESS OF FREMONT PAYNE, INC.

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RESPONDENT'S OPPOSING BRIEF

Official Report of Opinion Below

The opinion of the Court of Appeals of the State of New York, *New York Central R. Co.* v. *Beacon Milling Co., Inc.*, is reported in 293 N. Y. 218.

Jurisdiction of this Court

Respondent maintains that the judgment sought to be reviewed is not a final judgment reviewable on certiorari.

Both parties moved for a summary judgment in the trial court (R. 8-10). The trial court granted petitioner's motion and entered judgment dismissing the complaint (R. 24). Respondent appealed the granting of petitioner's motion but not the denial of its own motion,

hence upon reversal the Court of Appeals merely directed in its remittitur that petitioner's motion for summary judgment be denied (R. 57). As the case now stands, no judgment, final or otherwise, has been entered in favor of the respondent. The case awaits trial on the merits.

It may be that in respect to the issues already raised there is, as petitioner claims, page 3 of its brief, a final opinion of the Court of Appeals. However, the statute, Title 28 U. S. C. § 344(b), refers to a final judgment or decree, not a final opinion. It is for the trial court to determine, when the issue is presented to it for determination, whether judgment should be entered for respondent. Until such judgment is entered petitioner has not been hurt.

There is nothing to the contrary in *Department of Banking* v. *Pink,* 317 U. S. 264, cited by petitioner on page 3 of the petition. That case deals only with judgments issued upon full adjudication, not with judgments which merely set aside orders of dismissal. Something remains to be done in this case which is more than ministerial. It remains for the trial judge to exercise his informed discretion as to whether respondent is now entitled to judgment on the stipulated facts. Respondent believes that it is entitled to such judgment, but that until the judgment is entered in the trial court there cannot be said to be a final judgment, and even then it will not be a final judgment of the highest court of the state.

Statement of the Case

This is a suit by a railroad company to recover freight charges upon interstate shipments assessed in accordance with its duly filed and published tariffs. No issue is presented in respect to the filing or interpretation of the tariffs, the parties being agreed that the

tariffs were duly filed with the Interstate Commerce Commission and that the charges are correctly computed under the tariffs. The petitioner, without having previously secured a determination in its favor from the Interstate Commerce Commission, seeks to have the court look behind the published tariffs and determine that, insofar as the petitioner is affected, the tariffs were issued in violation of an order of the Interstate Commerce Commission and are, therefore, unlawful. Respondent, while denying that its tariffs were issued in violation of any order of the Commission, contends that the terms of the tariff are controlling in any event, and that the rates named therein were the legal rates which respondent must charge and collect.

The petitioner, sometimes hereinafter called Beacon, has a plant at Cayuga, New York, located on respondent's line of railroad, with a connection also to the Lehigh Valley Railroad, and there manufactures animal and poultry feed from various ingredients, chiefly grain. The grain is shipped to Cayuga by rail and is there accorded "transit" under the provisions of respondent's tariffs. By paying the inbound charges and claiming transit on the grain Beacon is permitted to use it in manufacturing mixed feed and ship out the product on the through rate applying from the point of origin of the grain to the ultimate destination of the mixed feed, securing, in that event, a refund of the inbound charges previously paid. The identity of the grain is not preserved. Transit is valuable to Beacon because it is thereby permitted to pay the through rates which are normally much less than the sum of the rates to and from Cayuga.

Where one commodity, such as grain, moves into a transit point and another commodity, such as mixed feed, moves out of a transit point, and the rates on the two commodities differ, what through rate will be applicable

is important. It is important to the transit operator, not only in respect to how much he himself pays, but also in respect to what his competitors at other points are paying, for if his through charges are on a higher basis than theirs he is at a competitive disadvantage.

Such a competitive disadvantage faced Beacon in 1929 and gave rise to the Commission's order which Beacon now claims invalidated the tariff provisions under which the charges sued for in this suit were levied. Beacon complained to the Interstate Commerce Commission that its competitors at Lancaster and York, Pennsylvania, Buffalo, New York, Toledo, Ohio, and Chicago and Peoria, Illinois, had in their transit operations the benefit of the grain basis of through rates in shipping to eastern destinations, while Beacon had to pay the higher mixed feed basis in making its shipments to the same destinations. Beacon's competitors were for the most part located in Central Territory where the carriers had voluntarily established a rule that the through charges would be those applicable on grain, the inbound commodity. Beacon, whose plant was at Cayuga in Eastern Territory, was subject to the so-called Trunk Line rule which required the assessment of through charges on the basis of the outbound commodity, which was mixed feed, and took a higher rate.

Beacon's complaint to the Commission alleged that the arrangement resulted in aggregate transportation charges which were unreasonable, prejudicial and discriminatory, in violation of the Interstate Commerce Act. The Commission sustained Beacon's complaint, finding in *Beacon Milling Co., Inc.* v. *New York Central R. Co.*, 157 I. C. C. 635 (October 10, 1929), that under the circumstances it was unreasonable to assess Beacon's through charges on the mixed feed basis while its competitors had the grain basis. The report points out, pages 639-40, that the Lehigh Valley Railroad, one of

the defendants, gave none of its shippers at other points a more favorable arrangement than it accorded Beacon at Cayuga, but that the New York Central did by joining in tariffs carrying the Central Territory rule at Peoria, Chicago, Toledo and Buffalo.

The order required the establishment of the Central Territory rule at Cayuga. The relevant portion of the order, which is quoted in part only on page 4 of petitioner's brief, required the carriers—

> "* * * to establish, * * * and thereafter to maintain and apply transit rules, regulations and practices with respect to the transportation of grain, grain products and grain by-products from points in central, southern and western territories to Cayuga, N. Y., there manufactured into mixed feed and shipped to destinations in eastern territory and New England, the same as the transit rules, regulations and practices now published in Agent B. T. Jones's I. C. C. No. 2069, in effect in central territory" (R. 30).

While the result of the order was to place Beacon's through charges on the grain basis, the grain basis was but a means to an end, namely, the placing of Beacon on an equal competitive footing with its competitors in other territories. The order was to continue until further order of the Commission.

The charges sued for arose out of the Commission's order in *Emergency Freight Charges, 1935, Ex Parte 115,* 208 I. C. C. 4 (March 26, 1935), and subsequent proceedings in the same case, 215 I. C. C. 439 (June 9, 1936).

In August of 1934 the carriers of the entire country, being faced with a financial emergency, filed a petition with the Interstate Commerce Commission seeking permanent increases in their freight rates and charges. The Commission, while disapproving the carriers' application for permanent increases, did approve a plan of

limited, temporary increases on specific services and commodities to be levied in addition to and apart from the prevailing rates and charges. These emergency charges, so-called, which were approved by the Commission were limited to selected commodities listed in the appendix to the Commission's report. Part 3 of the appendix listed, among other commodities, wheat, corn, barley, rye, rice, grain, etc., here collectively called grain, as commodities on which no line haul emergency charges were authorized (R. 37). Part 4 of the same appendix listed "Feed, animal or poultry, * * *" as taking the maximum emergency charges of three cents per 100 pounds (R. 43). The basis for this controversy was thus laid, since an emergency charge was authorized on animal or poultry feed, the outbound commodity shipped by Beacon, but not on grain, its principal inbound commodity.

The emergency charges were authorized though not prescribed by the Commission, and the carriers could accept or reject the Commission's proposal as they saw fit. However, since the Commission, as permitted by Section 6 of the Interstate Commerce Act, undertook in advance to relax its rules pertaining to tariff publications and permit tariffs containing the emergency charges which it had authorized to go into effect almost immediately in blanket supplements to existing tariffs and without suspension, the carriers were, for practical reasons, impelled to accept the Commission's proposal in order to obtain a general increase in their rates. "It should be clearly understood", said the Commission at page 59 of its report (208 I. C. C. 4), "that the plan of emergency charges here provided is permissive in character."

The order of the Commission modified all outstanding orders authorizing or prescribing rates and charges—

> "* * * to the extent necessary to permit the emergency charges herein authorized to be applied to the

rates and charges authorized or prescribed in or maintained or held by virtue of said outstanding orders; but that in all other respects said orders shall remain in full force and effect unaffected by this order'' (R. 50-51).

The plan for putting the emergency charges into immediate effect contemplated the filing and publishing of a single master tariff naming the charges and the rules for their application. This tariff was for general use throughout the country by all carriers. Item No. 70 in the master tariff, which is quoted in full in Appendix A,* provided a rule to cover all transit situations regardless of the commodity, the type of transit, the carrier involved, or the location of the transit point. The rule, so far as material here, provided in substance that where transit was accorded and an emergency charge was provided on either the inbound or outbound commodity, an emergency charge would be assessed on the through rate.

The master tariff which carried Item 70 became applicable to particular carriers by virtue of the filing of individual tariffs by such carrier incorporating the master tariff by reference. The emergency charges expired by limitation December 31, 1936. It is not disputed in this case that the respondent filed tariffs which made the rules of the master tariff applicable to Beacon's shipments and that the charges sued for were levied under Item 70 thereof.

No Question of Tariff Interpretation is Involved

There runs throughout the petition and brief a suggestion or inference that a question of tariff interpretation is involved in the case. There is repeated reference, for in-

* By stipulation in this proceeding (R. 59) tariffs were not reproduced in the Transcript of Record, but may be referred to by either party, and, to the extent referred to, are to be printed verbatim by said party in its brief. The record reference of "R. Appendix 86", supplied for Item 70 of the tariff at the top of page 12 of petitioner's brief refers to the record before the state court, not the record before this Court.

stance, to this Court's decision in *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, a decision that deals with construction of tariffs by courts. In referring to the case on page 16 of its brief, Beacon says:

> "There, as here, the carrier's contention was that courts are without jurisdiction over cases involving a disputed question of tariff construction unless there had been preliminary resort to the Commission."

This thought is followed up with two extracts from the case dealing entirely with tariff construction and still further with an extract from another case dealing exclusively with that feature. All of this implies that there is an issue of tariff interpretation here.

The fact is that there is no dispute, and never has been throughout the course of this litigation, as to the interpretation of the tariffs under which the charges sued for were levied. Indeed, the brief filed in this Court states, page 11:

> "It is not denied that the New York Central in incorporating in its tariffs the rate increases assumed to have been authorized by the Commission in *Emergency Freight Charges, 1935,* did so publish its rates and charges as to make the emergency increases so authorized with respect to mixed feed applicable to the transportation of Beacon's property. Indeed, the manner of publication of the increases was such that the shipper could not escape them, whether the charges assessed against him were based upon the rates on the inbound raw material, or upon the rates on the outbound mixed feed."

This is followed by a quotation from the tariff itself showing that there could be no dispute under its plain language, the full text of which is quoted in Appendix A hereto. Concerning the tariff petitioner further says, page 12, "This, in the language of the day, caught the shipper 'coming and going' ". There was, in other words, no possible dispute as to the meaning of the tariff.

ARGUMENT

I.

The petition shows no special or important reasons why the writ should issue.

1. The petition fails to show any special or important reasons why the writ should issue. It fails particularly to show wherein there is involved a "federal question of substance not theretofore determined by this court", as suggested by Section 5(a) of Rule 38.

The eight points set forth on pages 4 and 5 of the petition as "Reasons Relied Upon for the Granting of the Writ" raise no federal question beyond the determination of what tariff rates apply to the transportation of Beacon's mixed feed in interstate commerce; even this question is not shown to be one of substance.

The "Summary of Argument" appearing on pages 7 and 8 of the brief states the principal issue to be whether or not the New York Court of Appeals erred in construing orders of the Commission affecting Beacon's freight charges. We call attention to the fact that one of the orders involved, that issued by the Commission on March 26, 1935, in *Ex Parte 115,* and all of the tariffs issued pursuant thereto, expired December 31, 1936. It does not appear anywhere in the petition that other parties have an interest or that there is any large question of principle involved in a controversy pertaining to one shipper's charges levied under orders and tariffs long since withdrawn.

2. The petition fails to show in what manner a state court had decided a federal question of substance "in a way probably not in accord with the applicable decisions of this court", as suggested by Section 5(a) of Rule 38.

No federal case in conflict with the state court's opinion is referred to in the eight points set forth on pages 4 and 5 of the petition as reasons for the granting of the writ. Under summary of argument, page 8 of the brief, seven

miscellaneous cases are listed as being "applicable and persuasive", but upon examination they prove to be most inapplicable and not at all persuasive. They give no support, obliquely or otherwise, to petition's contention that a court may refuse to enforce the plain provisions of a tariff on the grounds that the tariff, though duly filed and published, violates some order of the Commission. The cases turn on divers points, such as the construction to be given to the language of a tariff (*Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285); whether it is constitutional to permit carriers to levy a penalty charge, so-called, for car detention in a demurrage tariff (*Turner, D. & L. Lumber Co.* v. *Chicago, M. & St. P. R. Co.*, 271 U. S. 259); whether an order permitting a railroad to abandon a line may abrogate private contracts (*Central New England R. Co.* v. *Boston & Albany R. Co.*, 279 U. S. 415); whether the Commission in its quasi-judicial capacity may award reparation upon finding unreasonable a rate it previously established in its quasi-legislative capacity (*Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370); whether the United States Shipping Board had exclusive jurisdiction over agreements between carriers alleged to be in violation of the anti-trust laws (*United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474); whether a court in reviewing a reparation order of the Commission is bound by the Commission's interpretation of a tariff (*Brown & Sons Lumber Co.* v. *Louisville & N. R. Co.*, 299 U. S. 393); whether a carrier may obtain a judgment for undercharges while the shipper is endeavoring to procure reparation in a proceeding before the Commission (*Crancer* v. *Lowden*, 315 U. S. 631).

Nothing in these cases indicates that the New York Court of Appeals in deciding that Beacon was bound to pay the tariff charges and should seek its remedy, if any, before the Commission, was acting contrary to the applicable decisions of this Court. As will be demonstrated later herein, the Court in so deciding was acting in accord with the applicable decisions of this Court.

II.

Certiorari should not be granted to review a judgment for freight charges entered in strict accord with the terms of a published tariff.

Whether the Commission did in fact authorize emergency charges on Beacon's shipments in *Ex Parte 115* and whether such emergency charges were published in violation of an outstanding order in the *Beacon* case, referred to later herein, need not be considered at this point. The fact of paramount importance is that the charges sued for were assessed in strict accordance with the tariffs and thus are the legal charges.

Interstate rates named in tariffs lawfully on file with the Interstate Commerce Commission are the legal rates. In *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, the Court said, page 197:

> "* * * The statute required the carrier to abide absolutely by the tariff. It did not permit the Company to decide that it has charged too much and then make a corresponding rebate; nor could it claim that it had charged too little and insist upon a larger sum being paid by the shipper. (February 4, 1887, 24 Stat. 379, c. 104, § 2; March 2, 1889, 25 Stat. 855, c. 382, § 6. *Armour Co.* v. *United States*, 209 U. S. 56, 83). The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon Railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

The principle set forth in the above statement is the corner stone of the federal system of rate regulation. It

is repeated and enlarged upon in numerous other cases, such as:

Robinson v. *Baltimore & Ohio R. Co.*, 222 U. S. 506;
Louisville & Nashville R. Co. v. *Maxwell*, 237 U. S. 94;
Pittsburgh C. C. & St. L. Ry. Co. v. *Fink*, 250 U. S. 577;
New York Central & H. R. Co. v. *York and Whitney*, 256 U. S. 406;
Davis v. *Portland Feed Co.*, 264 U. S. 403;
Lowden, et al. v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516;
Arizona Grocery Co. v. *Atchison, Topeka & Santa Fe R. Co.*, 284 U. S. 370.

One of the latest pronouncements is in *Yakus* v. *United States*, 321 U. S. 414, where, by way of illustration, the Chief Justice said, page 445:

> "For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U. S. C. §§ (6(7), 10 (1); *Armour Packing Co.* v. *United States*, 209 U. S. 56, 81; *United States* v. *Adams Express Co.*, 229 U. S. 381, 388. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution. *United States* v. *Vacuum Oil Co.*, 158 F. 536, 539-41; *Lehigh Valley R. Co.* v. *United States*, 188 F. 879, 887-8. See also *United States* v. *Standard Oil Co.*, 155 F.

305, 309-10, reversed on other grounds, 164 F. 376, Compare *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 196-7; *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370, 384."

III.

The merits of petitioner's claim do not warrant issuance of the writ.

This point considers the merits of the claim made by the petitioner that the charges sued for were not authorized by the Commission's orders in *Emergency Freight Charges, 1935, Ex Parte 115*, 208 I. C. C. 4, 215 I. C. C. 439, and were published in violation of the Commission's order in *Beacon Milling Co., Inc.* v. *New York Central R. Co.*, 157 I. C. C. 635. The respondent's position is that the charges sued for were authorized by the Commission and were not published in violation of any order of the Commission.

By its orders in *Ex Parte 115* the Commission authorized the carriers to place an emergency charge on animal and poultry feed (R. 43). Beacon shipped such feed out of Cayuga. Even though normal rates on the transited product were on the grain basis, the product was as a matter of fact animal or poultry feed. Without the transit privilege the local rate on the animal or poultry feed would apply from Cayuga to final destination. In order to obtain any emergency charge on such animal or poultry feed handled under transit provisions of the tariff it was necessary for the carriers to add the emergency charge to the going rate that was assessed for the entire transportation, *i. e.*, the through rate.

The carriers interpreted the Commission's inclusion of animal and poultry feed in the list of products taking the maximum emergency charge as an indication

that the Commission intended that this product could and should bear an increased charge. The basis on which normal freight charges, as distinguished from emergency charges, were computed on transit shipments, was not alluded to. Indeed the whole subject of transit was omitted in the Commission's report. The carriers were left free to carry out the details of the Commission's authorization, subject, of course, to the continuing supervision and control of the Commission.

The Commission accepted the master tariff for filing. Item 70 of that tariff provided a uniform method of applying the emergency charge to transit shipments, viz.: if an emergency charge was authorized on either the inbound or the outbound commodity, then the charges were to be added to the through rate. All shippers were thus treated alike and the carriers secured maximum revenue to meet an emergency confronting them. May a court now say that the carriers were wrong in their interpretation of the order and that the Commission should have suspended the tariff, or the particular item?

It is reasonable to believe that if the rule promulgated by the carriers was not in conformity with the order the Commission itself would have suspended it and prevented it from ever going into effect. The Commission not only accepted the master tariff for filing, but in a further hearing more than a year later authorized extension of the charges for an additional six months (215 I. C. C. 439). Its second report indicated, page 445, that the master tariff published by the carriers had carried the authorized increases; page 453, that the animal and poultry feed people had been heard to protest; page 464, that the Commission was satisfied as to the apportionment of the increases between particular commodities; page 464, that though making changes in cer-

tain of the charges it did not affect the basis then being charged on animal or poultry feed; and, page 467, that continuation of the existing charges was authorized until December 31, 1936. These statements permit the inference that the increases already in effect for a year were those originally authorized by the Commission. In any event, here was the time for the petitioners to complain.

While the Commission's orders were permissive in respect to the emergency rates, they were also enabling. Outstanding orders in prior cases were modified for the benefit of carriers desiring to take advantage of the permission to increase their rates. All outstanding unexpired orders of the Commission authorizing or prescribing rates and charges were amended "to the extent necessary to permit the emergency charges herein authorized to be applied to the rates and charges authorized or prescribed in or maintained or held by virtue of said outstanding orders * * *" (R. 50). This was intended to remove the bar that might have otherwise existed under outstanding orders of the Commission prescribing rates. It was made plain that these orders were not to act as a holddown or impediment to the application of a uniform or general increase in rates. If the *Beacon* order was still outstanding, it was modified, as were all other outstanding orders, to the extent necessary to permit a general increase to take place.

The *Beacon* decision, as has already been pointed out, required that the carriers' tariffs providing for assessment of Beacon's through rates on the animal or poultry feed basis be amended to provide for assessment on the grain basis in order to place Beacon on a competitive equality with mills in other territories. These mills had an advantage under the old arrangement because the grain rates they used were lower than the feed rates Beacon used. The order in the case gave Beacon just

what its competitors had, plus the necessary protection of a continuing order. However, under Beacon's theory of this case, such order protects Beacon, not from receiving less favorable treatment than its competitors, which was its purpose, but from having a general increase apply to its through rates.

Beacon's position amounts to no more than this: "The outstanding order issued in our case in 1929 protects us from the *Ex Parte 115* increases of 1935, and we are not at all concerned that our competitors, for lack of an order protecting them, are exposed to the increases." It is not a matter of proving that Beacon's competitors have paid the charges, though this would have been helpful had it been done, but rather whether the interpretation of an order is reasonable that makes such a result possible. A simple answer is that the *Beacon* order was amended along with all others so that all could be treated alike.

IV.

Certiorari should not be granted to review administrative issues of the type raised herein in the absence of preliminary resort to the Interstate Commerce Commission.

The contention raised in Point VI, page 16, of petitioner's brief that the identical question was raised and an administrative determination secured in the *Beacon* case in 1929 has no merit and may be taken as an admission that an administrative ruling is necessary. The only administrative ruling made in the *Beacon* case in 1929, as is pointed out herein, page 5, pertained to a competitive situation that was then presented to the Commission. The present controversy arose six years later. It concerns other tariffs, published at a different time, under different conditions, and for a different purpose. The administra-

tive ruling Beacon needs, but has never obtained, pertains to the reasonableness and lawfulness of Item 70 of the master tariff under which the charges were assessed.

There is no precedent or reason for permitting a court to go behind the terms of a published tariff in the absence of preliminary resort to the Commission, and find its provisions unlawful as applied to a particular shipper. Preliminary resort to the Commission is necessary in order that the tariff rates may be enforced with uniformity until corrected in accordance with the statute. Violations of the statute as to preferences and discriminations would inevitably follow unless the requirement of a uniform standard of rates is complied with. If, without prior action by the Commission, a court could determine that a published rate was unlawful, it would follow that unless all courts reached an identical conclusion a uniform standard of rates would be impossible. The standard would fluctuate and vary depending upon the divergent conclusions reached by various courts as to whether the published rates were in conformity with the Commission's orders. To recognize such a power in the courts would be wholly inconsistent with the administrative power conferred upon the Commission and with the statute's requirement that uniformity and equality of rates be observed.

This view has been consistently maintained by this Court, both preceding and following the leading case of *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. It makes no difference whether a shipper is endeavoring to recover damages on account of the rates being unreasonable or otherwise in violation of the Interstate Commerce Act, or whether a carrier is suing for its charges under the published tariff. In the former case, as in the *Abilene Cotton Oil* decision, the shipper's suit falls for lack of preliminary determination of the administrative issue by the Commission, while in the latter case, as in *Crancer* v. *Lowden*, 315 U. S. 631, the carrier may recover its

published charges, leaving the shipper his independent remedy for reparation before the Commission. That is exactly the disposition made of this case by the Court of Appeals of the State of New York. Judgment was "without prejudice to any proceedings which the defendant may hereafter institute before the Interstate Commerce Commission" (R. 57). This disposition of the case was in entire accord with the decisions of this Court.

CONCLUSION

The application for writ of certiorari should be denied.

Respectfully submitted,

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Dated, November 13, 1944.

Appendix A

TARIFF OF EMERGENCY CHARGES.

Item No. 70 Transit Shipments.

(a) Where shipments are accorded transit privileges under transit tariffs (either with or without a transit charge or out of line charge) on basis of a through transportation rate (whether composed of one or more factors) and such shipments are forwarded from the original shipping station during the effectiveness of this tariff, the emergency charge for the movement under such rate shall be determined as follows:

1. Applicable when a compounded or blended commodity, subject to an emergency charge, is shipped from transit point:

If any portion of the weight of the out-bound commodity represents (under the transit adjustment) an in-bound commodity for which no emergency charge is provided, the emergency charge on such portion shall be that provided for the out-bound commodity from the point of origin (or from the rate-break point at which the transit arrangement begins as specified in the transit tariffs) to ultimate destination.

If any portion of the weight of the out-bound commodity represents (under the transit adjustment) an in-bound commodity for which an emergency charge is provided, the emergency charge on such portion shall be that provided for the out-bound commodity from the point of origin (or from the rate-break point at which the transit arrangement begins as specified in the transit tariffs) to ultimate destination.

2. Applicable to commodities other than as described in 1:

Apply one emergency charge as provided herein for the out-bound commodity to the through shipment from original shipping point to ultimate destination.

3. Where a shipment consists of commodities covered by 1 and 2 above, apply separately the rules applicable on each commodity.

4. Where the transportation charges for a portion (actual weight or a deficit in the minimum weight) of a shipment are based on a rate applicable from the transit point to final destination, that portion shall be subject to the emergency charge applicable from the transit point to final destination.

(b) Where freight is accorded a transit privilege under tariffs which provide for the computation of transportation charges on a different basis into and out of the transit point, and not on basis of a through rate via the transit point, the emergency charges shall be applied separately to the inbound and outbound shipments, but the aggregate of the inbound and outbound emergency charges on the quantity shipped outbound shall not exceed the maximum or specific emergency charge provided on the outbound commodity in Part 4 (if the outbound shipment is subject to carload emergency charge) or in Part 2 from point of origin to ultimate destination (if the outbound shipment is subject to less-than-carload emergency charges).

(c) The settlement or readjustment of the emergency charges shall be in accordance with rules provided in the transit tariffs for settlement or readjustment of the transportation charges, but such rules shall not operate to reduce the emergency charges provided in this tariff for transit shipments.

Any emergency charges accruing under Items Nos. 75 and 80, whether at origin station, at destination or at transit station are in addition to those provided for in this Item.